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In The

Supreme Court of the United States

October Term, 1995

SAMUEL J. STOORMAN,

Petitioner,

v.

GREENWOOD TRUST COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress intend for Delaware's legislative definition of "interest" to define the federal term "interest at the rate" in section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d ("§ 521"), and thereby displace other states' contract laws limiting the form or amount of contractual penalties for late payments on revolving credit accounts?

2. May Congress constitutionally delegate to Delaware the power to define the federal lending term "interest" for all fifty states so as to preempt other states' contract laws?

3. As a matter of federal law, does "interest at the rate" in § 521 include contingent, sum-certain penalty charges (late fees) so as to preempt state limitations on the form or the amount of contractual penalties on revolving credit accounts?

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Samuel J. Stoorman ("petitioner" or "cardholder") respectfully petitions for a writ of certiorari to review the judgment entered below by the Colorado Supreme Court. The judgment is another in the recent series of conflicting state supreme court and federal court of appeals decisions determining whether the term "interest" in DIDA § 521 and in § 30 of the National Bank Act ("NBA"), 12 U.S.C. § 85 ("§ 85"), includes late fees and other sum-certain penalty charges.[1] Some courts, like the Colorado court here, have held that sum-certain late fees are "interest" and that §§ 521 and 85 preempt state regulation of such penalty charges.[2] Other courts have concluded that sum-certain late fees are not "interest rates," that there is no federal preemption of state penalty laws and that the various states' consumer protection and contract laws regulating penalty fees are enforceable against

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[1] Section 85 of the NBA regulates the interest rates charged by national banks, while § 521 regulates the interest rates charged by federally-insured state banks. Because § 521 was modeled after § 85, the two statutes contain virtually identical language and raise the same issues.

[2] *See Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *cert. granted*, 116 S. Ct. 806 (1996) (§ 85 case); *Harris v. Chase Manhattan Bank, N.A.*, 30 Cal. App. 4th 130, 35 Cal. Rptr. 2d 733, *review granted*, 38 Cal. Rptr. 2d 346, 889 P.2d 540, *review dismissed*, 46 Cal. Rptr. 2d 748, 905 P.2d 417 (Cal. 1995), *petition for cert. pending*, No. 95-951 (U.S. filed Dec. 18, 1995) (combined § 85 and § 521 case); *Richardson v. Citibank (South Dakota), N.A.*, 908 P.2d 532 (Colo. Dec. 18, 1995) (§ 85 case); *Copeland v. MBNA America, N.A.*, 907 P.2d 87 (Colo. 1995), *petition for cert. pending*, No. 95-1056 (U.S. filed Dec. 28, 1995) (§ 85 case); and *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (§ 521 case).

out-of-state banks soliciting consumers in those states.[3] To resolve this conflict, the Court recently granted certiorari in a virtually identical case, *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *cert. granted*, 116 S. Ct. 806 (1996), now pending as case number 95-860. The only difference between this case and *Smiley* is that the latter involves § 85 while this case pertains to § 521. The issues raised by both cases are nearly the same.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (App. 1-7) is published at 908 P.2d 133 (1995). The opinion of the Colorado Court of Appeals (App. 11-21) is published at 888 P.2d 289 (1994). The order of the District Court, City and County of Denver, Colorado (App. 22-23) is unreported.

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[3] *See Hunter v. Greenwood Trust Co.*, 143 N.J. 97, 668 A.2d 1067 (1995), *petition for cert. pending*, No. 95-963 (U.S. filed Dec. 18, 1995) (§ 521 case); *Sherman v. Citibank (South Dakota), N.A.*, 143 N.J. 35, 668 A.2d 1036 (1995), *petition for cert. pending*, No. 95-991 (U.S. filed Dec. 21, 1995) (§ 85 case). *See also Mazaika v. Bank One, Columbus, N.A.*, 439 Pa. Super. 95, 653 A.2d 640 (1994) (*en banc*), *alloc. granted*, 659 A.2d 557 (Pa. 1995) (§ 85 case); *In re Citibank (South Dakota) Credit Card Litig.*, 439 Pa. Super. 79, 653 A.2d 39 (1995), *alloc. granted*, 659 A.2d 984 (Pa. 1995) (§ 85 case).

JURISDICTION

The Colorado Supreme Court entered its judgment (App. 1-7) on December 18, 1995. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 1 of the United States Constitution directs, in pertinent part, that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1.

The Supremacy Clause provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Full Faith and Credit Clause requires, in relevant part, that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. Const. art. IV, § 1.

Section 521 of DIDA states in pertinent part:

> (a) Interest rates
>
> In order to prevent discrimination against State-chartered insured depository institutions

> . . . with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank . . . would be permitted to charge in the absence of this subsection, such State bank . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or . . . at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.
>
> (b) Interest overcharge; forfeiture; interest payment recovery
>
> . . . the taking, receiving, reserving, or charging a greater rate of interest than is allowed by subsection (a) of this section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover in a civil action commenced in a court of appropriate jurisdiction . . . an amount equal to twice the amount of the interest paid from such State bank . . . taking, receiving, reserving, or charging such interest.

12 U.S.C. § 1831d (1994).

Section 30 of the NBA, as codified in part at § 85, provides, in pertinent part:

> Any [national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, . . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. . . .

12 U.S.C. § 85 (1994).

When this litigation began, the Colorado Uniform Consumer Credit Code ("UCCC"), 2 Colo. Rev. Stat. § 5-3-203 (1992) stated, in pertinent part:

> (5) (a) Except as provided in paragraph (b) of this section (5), with respect to a consumer loan, refinancing, or consolidation which is not precomputed, including a revolving loan account, the parties may contract for a delinquency charge on any installment not paid in full within ten days after its scheduled due date in an amount not exceeding the lesser of five percent of the unpaid amount of the installment or ten dollars; except that the provisions of this paragraph (a) shall not apply to a revolving loan account for which a lender credit card is issued by the lender to the debtor.[4]

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[4] When this litigation began, § 5-3-203 forbade the imposition of sum-certain late fees on revolving credit accounts.

Section 945 of Title 5 of the Delaware Code, entitled "Interest charges," provides in pertinent part:

> In addition to or in lieu of interest at a periodic percentage rate or rates . . . a bank may, if the agreement governing the revolving credit plan so provides, charge and collect, as interest, in such manner or form as the plan may provide, 1 or more of the following:
>
> (1) A daily, weekly, monthly, annual or other periodic charge in such amount or amounts as the agreement may provide for the privileges made available to the borrower under the plan;
>
> (2) A transaction charge or charges in such amount or amounts as the agreement may provide for each separate purchase or loan under the plan;
>
> (3) A minimum charge for each daily, weekly, monthly, annual or other scheduled billing period under the plan during any portion of which there is an outstanding unpaid indebtedness under the plan. . . .

Del. Code Ann. tit. 5, § 945 (1993).

Section 950 of Title 5 of the Delaware Code, which is entitled "Delinquent installments," provides in pertinent part:

Colorado has recently amended the statute to allow sum-certain late fees, but only in certain limited amounts.

> If the agreement governing a revolving credit plan so provides, a bank may impose, as interest, a late or delinquency charge upon any outstanding unpaid installment payments or portions thereof under the plan which are in default; provided, however, that no more than 1 such late or delinquency charge may be imposed in respect of any single such installment payment or portion thereof regardless of the period during which it remains in default. . . .

Del. Code Ann. tit. 5, § 950 (1993).

STATEMENT

The Colorado Supreme Court held below that the law of a bank's home state, in this case Delaware, provides the definition of "interest" in § 521. Delaware's definition of "interest" includes late fees. *See* Del. Code Ann. tit. 5, §§ 945 & 950. Incorporating that definition into § 521 results in Delaware law preempting Colorado's prohibition of sum-certain late charges on revolving credit accounts held by Colorado consumers. Can Delaware enlarge the definition of a federal term in a federal statute and thereby determine and expand the scope of federal preemption? Can one state preempt without limitation the consumer protection and contract laws of all the other states? These are the fundamental constitutional questions that are at issue here as in *Smiley*.

A. Background and Facts

Greenwood Trust Company ("Greenwood" or "the bank") is a federally-insured state-chartered bank located

in Delaware, one of several small states that sought to attract large credit card operations in the 1980s by deregulating banking and repealing consumer protection laws. *See* Federal Reserve Bank of Chicago, "Small States Teach a Big Banking Lesson," *Chicago Fed. Letter*, No. 10 (June 1986). Those states passed unique legislation that, contrary to the common law, redefined "interest" as including late fees, attorneys' fees and other contract terms and penalties. The idea was to allow national banks and federally-insured state banks relocating to those states to "export" the terms and penalties into other states under the guise of "interest," a prospect that goes well beyond the exportation allowed under the federal banking laws.

The exportation of interest rates from one state to another has as its genesis § 85 of the NBA. Enacted during the Civil War, in part to prevent discrimination against national banks with respect to interest rates, § 85 embodies the "most favored lender" doctrine. As enunciated by this Court in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874), that doctrine allows a national bank to charge the highest "rate" of "interest" allowed by its home state.

The Court examined the most favored lender doctrine in *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978), where it considered the meaning of the word "located" in § 85 and the preemptive scope of the statute. Articulating what has become known as the exportation doctrine, the Court held that a national bank may "export" its home state's *interest rate* into other states. The Court also held that the term "located" in § 85 has a firm, federal definition. The Court did not, however, define the terms "interest" or "rate." Nor did it hold that the laws of a national bank's home state govern all

the contractual terms or charges (other than "interest" as defined by Congress) imposed on consumers in other states.

In the 1970s, the United States economy experienced a period of severe inflation and recession that caused a dramatic rise in interest rates. National banks easily weathered the storm because § 85 allowed their lending rates to rise with the inflation-sensitive federal discount rate. By contrast, state chartered lenders were at an extreme disadvantage because they had to pay higher and higher interest rates to procure money but, under their states' relatively low usury ceilings, were limited in the rate of interest they could charge on their loans. To remedy this credit crunch, Congress, in 1980, enacted DIDA, which arguably extended the most favored lender principle to federally-insured state banks. Modeled after § 85, § 521 and other sections of DIDA allow a federally-insured state bank, like Greenwood, to choose between two interest rates: one, "a rate of not more than 1 per centum in excess of the [federal] discount rate," or two, "the rate allowed by the laws of the [bank's home] State . . . whichever may be greater."

Misinterpreting both the most favored lender doctrine and this Court's holding in *Marquette*, banks like Greenwood have sought to export more than just the *rate* of interest allowed under §§ 85 and 521. Based on their home states' unique and relatively recent redefinitions of "interest," they have construed the federal statutes as including all lending charges and, under the guise of "interest," have sought to export sum-certain late fees into other states where such penalty charges are precluded or limited by state contract and consumer protection laws.

The present case challenges Greenwood's exportation of contract penalties allowed in Delaware, its home state, into Colorado, where numerous Greenwood customers reside and were solicited to receive a credit card and where such fees were prohibited. From Delaware, Greenwood issues credit cards to customers in Colorado and every other state. (App. 25, 28). Greenwood charges these customers not only a hefty annual percentage rate, but also a separate and additional $10 late charge if a specified minimum payment is not received by the bank within a number of days after the payment due date. (App. 28-29). The bank charges the $10 flat fee regardless of the outstanding balance, the amount of the payment owed, the actual number of days the payment is late, or the administrative costs associated with processing a late payment. In addition, Greenwood's cardholder agreement treats the late payment as a technical breach of the contract and does not waive or forbear the default even if the late fee is paid. (App. 29). Bearing no relationship to the payment owed, the passage of time or the bank's actual processing costs, and imposed in addition to continuing interest rate charges for delay, the late fee is a classic contract penalty. (*See* App. 30, 37-38).

Here, Greenwood exported its late fees into Colorado and imposed them on petitioner and other Colorado residents in violation of Colorado law. In response, cardholder filed this consumer class action on March 6, 1992, on behalf of himself and all other Colorado residents who have been charged sum-certain late fees on credit cards issued by Greenwood.[5] (App. 24).

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[5] Cardholder's complaint asserts that, in charging the late fees, Greenwood: (1) violated UCCC § 5-3-203(5)(a) which

B. How the Federal Question Was Presented and Resolved Below

Greenwood presented the federal question in moving for summary judgment. Relying primarily on *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *reversing*, 776 F. Supp. 21 (D. Mass. 1991), *cert. denied*, 113 S. Ct. 974 (1993), the bank contended that Colorado law regulating penalty charges is preempted by § 521. The trial court, on February 4, 1993, entered an order dismissing cardholder's complaint. (App. 22-23).

Cardholder filed a notice of appeal on February 11, 1993. Following briefing and oral argument, the court of appeals affirmed the trial court. Adopting the analysis of the First Circuit in *Greenwood Trust*, the court of appeals concluded that "interest" under § 521 includes sum-certain late fees. (App. 15-18).

On December 18, 1995, the Colorado Supreme Court affirmed dismissal of the case. Basing its decision on different grounds, the court went beyond simply holding that "interest" under § 521 includes late fees. The court explained:

> Therefore, we conclude, that, as a matter of federal law, late payment fees are included as a form of "interest" under section 521 of the DIDA. Because Greenwood is a federally-insured, state-chartered bank located in Delaware, and Delaware law permits the imposition

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prohibited delinquency charges (such as late fees) on revolving credit accounts prior to 1994 (App. 35-37); (2) violated the Colorado Consumer Protection Code by creating confusion in charging late charges not permitted under Colorado law (App. 38-39); and (3) was unjustly enriched (App. 37-38).

> of a late payment fee, Greenwood can charge Stoorman a ten dollar late payment fee despite the fact that a Colorado consumer protection law prohibited such fees.

(App. 7). Though the court stated that it was defining "interest" "as a matter of federal law," in fact, the court looked to Delaware law to define the federal term.

REASONS FOR GRANTING THE PETITION

A. The Judgment Below Conflicts with New Jersey Supreme Court Decisions and Raises the Same Issues as *Smiley*.

The decision here, like the judgment under review in *Smiley*, holds that sum-certain late fees are "interest" and that state regulation of such fees is preempted. That holding conflicts with two recent decisions rendered by the New Jersey Supreme Court. In *Hunter v. Greenwood Trust Co.*, 143 N.J. 97, 668 A.2d 1067, (1995), *petition for cert. pending*, No. 95-963 (U.S. filed Dec. 18, 1995), New Jersey's high court held that sum-certain late fees are not "interest rates" and that § 521 does not preempt state laws limiting sum-certain penalty charges imposed to punish or deter a breach of contract. Similarly, in *Sherman v. Citibank (South Dakota), N.A.*, 143 N.J. 35, 668 A.2d 1036 (1995), *petition for cert. pending*, No. 95-991 (U.S. filed Dec. 21, 1995), a § 85 case, the New Jersey high court again concluded that sum-certain late fees are not "interest" and that the NBA does not preempt state regulation of such charges. This case, then, presents the same conflicts among state supreme courts concerning federal law as are presented in *Smiley*. It likewise presents the same issues.

Just as *Smiley* was worthy of this Court's consideration, so, too, is the case at bar.

B. The Colorado Supreme Court's Decision Has Wide-Ranging and Dangerous Consequences

This case and *Smiley* implicate important issues that go beyond most preemption questions confronted by the Court. Unlike other preemption cases, the petition here, as in *Smiley*, challenges a holding that ties the scope of federal preemption directly to the ever-changing legislation of an individual state that is home to a national or a federally-insured state bank. If, as the lower court effectively held, § 521 has been judicially amended to include all charges "related to" a loan, then Delaware's legislative definition of the components of "interest," and not just its arithmetic "rate," has displaced the contract and consumer protection laws of all the other states. This would mean that attorneys' fees, court costs, foreclosure fees and other default penalties would be federalized "interest" if allowed by a bank's home state. As Delaware has done here, the home states of banks would be free to preempt without limit countless laws of other states simply by connecting their loan-related authorizations to the "interest" allowed in each home state. By making the scope of preemption depend on the laws of a bank's home state, Congress would be making the laws of one state supreme to all others.

In this regard, the decision below conflicts in principle with this Court's preemption analysis in *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995). In *Travelers Ins. Co.*, this Court

considered an express preemption clause which, unlike here, included the phrase "related to." Contrary to the Colorado court's analysis below, this Court refused to read the phrase "related to" as including the entire economic package of insurance-related costs. *Id.* at 1679-80. Ignoring that decision, the court below not only judicially added the phrase "related to" to § 521, but also interpreted the section to include the entire package of loan-related charges within the preemptive scope of the statute. In this way, the lower court enlarged the federal statute in violation of this Court's preemption principles.

By linking the scope of "interest at the rate" to the laws of a bank's home state, the decision below also conflicts with this Court's decisions interpreting § 85 of the NBA. In *Haseltine v. Central Bank*, 183 U.S. 132, 134 (1901), the Court held that "the definition of usury and the penalties affixed thereto must be determined by the National Banking Act, and not by the law of the State." Similarly, in *Evans v. National Bank*, 251 U.S. 108 (1919), the Court recognized that both "interest" and "usury" are determined by reference to federal law, stating:

> The maximum interest rate allowed by the Georgia statute is eight per centum. That marks the limit which a national bank there located may charge upon discounts; but its right to retain so much arises from federal law. The latter also completely defines what constitutes the taking of usury by a national bank, *referring to the state law only to determine the maximum permitted rate.*

Id. at 114 (emphasis added). The holding of the court below ignores and impliedly rejects these controlling authorities.

Furthermore, in defining "interest" in § 521 pursuant to Delaware law, the court below utterly failed to recognize that Congress has never incorporated a state's laws without limitation into a federal statute where that state's laws would preempt other states' laws. Congress has instead limited incorporation to well-defined areas in which the state standard would operate principally, if not exclusively, within the boundaries of the state itself. *See, e.g., United States v. Sharpnack*, 355 U.S. 286 (1958) (addressing Assimilative Crimes Act of 1948, which adopted state law as the federal criminal law for military bases and federal enclaves located in each particular state).

This case is not one in which the incorporation of Delaware law affects only Delaware. The Colorado court's ruling that Delaware law defines "interest" or loan-related charges in § 521 leads to the absurd and unconstitutional result that Congress has authorized Delaware to legislate federal lending terms for the entire country. The Constitution does not allow the bank to define federal law with reference to its own state's laws and thereby elevate Delaware law over the laws of Colorado and other states. Nor can the states constitutionally enlarge or diminish the scope of federal preemption by redefining the federal term "interest." "To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980).

Moreover, the lower court's decision conflicts with this Court's anti-delegation precedents. Article I, section 1 of the Constitution provides that "[a]ll legislative powers . . . *shall be vested in a Congress* of the United States." U.S. Const. art I, § 1 (emphasis added). If, as held below, the scope of "interest" in § 521 is determined by the law of a bank's home state, then Congress's delegation of such legislative authority to Delaware violates Article I.

This Court's decision in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), demonstrates the point. In that case, the Court described the standards for delegating congressional power and struck down a statute that delegated interstate policy-making authority to the President, who then adopted state laws as the operative restrictions. In rejecting the open-ended delegation, the Court focused on the absence of any guidelines limiting the scope or nature of the delegated authority:

> [The statute] does not seek to lay down rules for the guidance of state Legislatures or state officers. It leaves to the states and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority. . . . It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action.

Id. at 415. The Court also found that the context of the statute failed to provide any "standard or rule" against which the delegated authority could be measured. *Id.* at 418.

Here, delegation to Delaware of the legislative power to define the federal term "interest" or charges "related to" interest likewise fails. Neither the word "interest" nor

the legislative histories of the NBA and DIDA provide any guidance to the states or to a reviewing court as to the scope or limits of the delegated discretion. As interpreted by the lower court, Congress has provided no definition, established no standard, laid down no rule and declared no policy separate from that of the individual states and, therefore, the delegation is unconstitutional. *See Panama Refining*, 293 U.S. at 430 ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested"); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion) (construing statute so as to avoid open-ended delegation of legislative power).

To allow Delaware law to define "interest" in § 521 and, in turn, the preemptive scope of the statute, is to allow that state to substitute its will for the will of Congress. The decision whether "interest" includes liquidated damages, attorneys' fees, court costs or other contractual penalties is "quintessentially one of legislative policy" that should be made by Congress, not by an individual state legislature that is unaccountable to the will of the nation. *See Industrial Union*, 448 U.S. at 685 (Rehnquist J., concurring). Residents of Colorado and other affected states have no voting opportunity to influence the legislators in Delaware. Absent accountability, the unlimited linkage of preemption with home state authorizations inferred by the lower court would constitute a serious violation of the principles embodied in Articles I and IV of the Constitution. *Cf. Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 151-52 (1963).[6]

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[6] In *Florida Lime*, this Court refused to find a California law preempted where residents of that state had no real opportunity

Unless § 521 is read with reference to the common law so as to exclude sum-certain late fees from the definition of "interest," each state could give a different meaning to the term, thereby determining the scope of federal preemption and extending its own lending laws into other states without limit. This Court has recognized that danger before. In *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969), the Court considered whether federal or state law defined the term "branch" in the NBA. The Court stressed that permitting state legislatures to define the federal term "branch" would "make them the sole judges of their own powers," and that "Congress did not intend such an improbable result." *Id.* at 133-34. Here, too, Congress did not intend for Delaware to define the scope of federal preemption and thereby be the sole judge of its own power. The Colorado Supreme Court's ruling conflicts with these principles and should be reviewed immediately.[7]

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to participate in the process that resulted in the federal regulation which allegedly superseded California's law. Here, too, Colorado residents have had no opportunity to participate in the process that has allegedly resulted in Delaware law preempting Colorado law. *See* Laurence H. Tribe, *American Constitutional Law* § 6-26 at 496-97 (2d ed. 1988) (noting the apparent concern for delegation issues in *Florida Lime*).

[7] Although *Marquette* has, in effect, permitted a bank's home state to establish "interest rates" that are controlling in other states, that result is not a forbidden abdication of Congress's lawmaking authority. Adoption of a state's time-based rate or required charge for a loan is in fact bounded and checked by a federal definition of "interest at the rate" that is limited to compensation for a loan of money for a stipulated time. *Cf. Bowsher v. Synar*, 478 U.S. 714, 732 (1986) (indicating that delegation of "essentially ministerial and mechanical" power is constitutional). That definition provides definite federal standards to determine whether a home state's "rate"

C. The Decision Below Disregards Preemption Principles, Misconstrues the Most Favored Lender Doctrine and Improperly Expands the Common Law Definition of "Interest."

The Colorado court's decision disregards even the most basic preemption principles. As this Court has held time and again, there is a strong presumption *against* federal preemption of state law. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). As a result of that presumption, " 'the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the *clear and manifest purpose* of Congress.' " *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (plurality opinion) (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Unless a state law "incapacitates the [national] banks from discharging their duties to the government," there will be no preemption. *McClellan v. Chipman*, 164 U.S. 347, 357 (1896).

Here, in finding preemption, the Colorado court relied on its earlier decision, *Copeland v. MBNA America, N.A.*, 907 P.2d 87 (Colo. 1995), *petition for cert. pending*, No. 95-1056 (U.S. filed Dec. 28, 1995), a § 85 case involving the same issues. In *Copeland*, the court recognized that

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comports with the will of Congress or exceeds Congress's intent. If, in contrast, Delaware has been entrusted to expand the meaning of "interest" and "rate" so as to determine what credit terms are lawful, as the lower court held, then Congress has delegated to that state national lawmaking authority and Supremacy Clause powers. Allowing Delaware to set not just a time-based rate required for a loan but also to define the actual rights and liabilities of credit cardholders (*e.g.*, what "late" means? whether attorneys' fees are collectible?), subverts the entire structure of federalism.

neither § 85 nor its legislative history contained any clear statements of Congressional intent to preempt state regulation of late fees. Nevertheless, the court held that if Congress had intended to limit preemption to numerical percentage rates it would have said so. *Id.* at 93. In other words, according to the court below, whenever Congress enacts a federal statute, if it is silent with respect to the scope of preemption, it intends to preempt everything not mentioned. That analysis directly conflicts with the standards set forth in *Cipollone*, *McClellan* and dozens of other decisions by this Court.

Nor does *Marquette* support an expansive reading of federal preemption principles. *Marquette* established a firm, federal definition of the word "located" in § 85 and held only that a national bank may export its home state's *rate* of interest. *See* 439 U.S. at 313-14. Since Delaware's definition of the components of interest has nothing to do with the unlimited *rate* at which interest is allowed in that state, *Marquette* provides no basis for exporting Delaware's definition of interest. *See Sherman*, 143 N.J. at 48-49, 668 A.2d at 1042. Greenwood may still charge the unlimited rates allowed by its home state when it solicits consumers in Colorado and other states. It may not, however, impose a separate, sum-certain penalty fee which is neither a "rate" based on the time-value of the money owed nor "interest." Because Colorado law does not limit the amount of Greenwood's "interest rates," but only the form of its non-interest charges, the state law does not conflict with § 521.

The lower court's decision also directly conflicts with the common law interpretation of federal statutes mandated by this Court. This Court recently reaffirmed the

strong presumption of a common law meaning for words used in a federal statute in *United States v. Texas*, 507 U.S. 529 (1993). In that case, which likewise considered the meaning of "interest" in a federal statute, the Court instructed:

> [s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles. . . . In such cases, Congress does not write upon a clean slate. . . . In order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law.

Id. at 534 (citations and internal quotation marks omitted); *see also United States v. Shabani*, 115 S. Ct. 382, 384 (1994). The Court also distinguished between interest and penalties (including late fees) and found that penalties are "more onerous than the common law" of prejudgment interest. 507 U.S. at 536 ("Unlike the common law, § 3717 also imposes processing fees and penalty charges"). Penalties cannot be "more onerous" than interest if they are one and the same, as the Colorado court incorrectly held below.[8]

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[8] The lower court also erroneously assumed that Congress, by its silence, intended to change the common law when it used the word "interest" in § 521. Because § 521 does not " 'speak directly' to the question addressed by the common law," however, it does not abrogate that common law. *Id.* at 1634. Therefore, Congress must have intended "interest" in § 521 to be construed uniformly based on the ordinary, common law meaning of the term. *See Perrin v. United States*, 444 U.S. 37, 42 (1979).

Congress was fully aware of the ordinary, common law differences between late charges and interest when it passed the NBA in 1864. On at least three occasions before passage of the Act, this Court had already held that sum-certain contingent default charges, like late fees, were not "interest." For example, in *Tayloe v. Sandiford*, 20 U.S. 13, 17, 7 Wheat. 7, 8 (1822), the Court recognized that "[i]n general, a sum of money in gross, to be paid for the nonperformance of an agreement is considered as a penalty." Later, in *Lloyd v. Scott*, 29 U.S. 205, 4 Pet. 173 (1830), the Court held:

> If a party agree [sic] to pay a specific sum, exceeding the lawful interest, provided he do [sic] not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, *which is considered as a penalty.*

Id. at 226, 4 Pet. at 190 (emphasis added). Likewise, just one year before enactment of the NBA, the Court stated with respect to any contingent charge:

> The payment of anything additional depends also upon a contingency, and not upon any happening of a certain event, which of itself would be deemed insufficient to make a loan usurious.

Spain v. Hamilton's Adm'r, 68 U.S. (1 Wall.) 604, 626 (1863). Because Congress also was well aware that "[t]he popular or received import of words furnishes the general rule for the interpretation of public laws," *Maillard v. Lawrence*, 57 U.S. (16 How.) 251, 261 (1854), it must have used the term "interest" as it was ordinarily understood at common law

to exclude contingent, sum-certain penalties imposed in addition to continuing finance charges.[9]

At common law, "special damages" that more than compensated a lender for the time-value of money were prohibited. For example, in *Loudon v. Taxing Dist.*, 104 U.S. (14 Otto) 771 (1881), a borrower defaulted, requiring the lender to sell his own assets at a substantial discount. The lender sued for the "costs" of the default. The issue was whether the borrower was liable for more than the time-value of the lender's money. This Court held that interest measured by time is the *only* damage allowed:

> *[A]ll damages for delay* in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages.

Id. at 774 (emphasis added). *See also Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930) ("But agreements to pay fixed sums plainly without reasonable relation to any

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[9] Ancient law also shows that "interest" and sum-certain contract penalties are not the same. At Roman law, the only "interest" that was allowed was that measured by time following a default. In effect, "*interesse*" (interest) and penalties were the same. But the measure of the "interest" (then called penalty) was based on the unpaid balance and measured by time. Any greater amount was a classic contract penalty ("*nomine poenae*") that was "relievable against in equity." *See* Robert B. Comyn, *Treatise on the Law of Usury*, 73-74 & n.(a) (R. Pheney, London 1817); *see also Library of Congress v. Shaw*, 478 U.S. 310, 322 n.2 (1986). Today, as in Roman times, "interest" following a loan default is likewise limited and must be measured by time and the "*id quod interest*" (that which is between) standard. *See* 478 U.S. at 322 n.2.

probable damage which may follow a breach will not be enforced"); *New Orleans Ins. Co. v. Piaggio*, 83 U.S. (16 Wall.) 378, 386 (1872) (a party "cannot recover special damages for the detention of money due to him beyond what the law allows as interest").

The court below turned the reasoning of this common law upside down. Instead of holding that "interest" based on the unpaid balance and the passage of time is the "measure of all such damages," the court effectively found that additional, sum-certain "penalties" are the measure of all "interest." That holding completely disregards the guidelines established by this Court in *United States v. Texas, Tayloe, Lloyd, Spain, Loudon* and *Piaggio*.

To be sure, "interest" in § 521 may include "damages" paid after a loan default, such as back-end charges to compensate the lender for the time-value of its money. Those "damages" that are based on an unpaid balance and measured by time may be "interest in the nature of damages." But contingent sum-certain charges like credit card late fees, attorneys' fees, return check fees and over-limit fees, because they are neither based on the unpaid balance nor measured by time, are not "interest in the nature of damages." *See Meilink v. Unemployment Resources Comm'n*, 314 U.S. 564, 570 (1942) (the distinction between a "penalty as a fixed *ad valorem* amount taking no account of time, and interest which does depend on time, is persuasive"). Thus, as this Court has recognized, where a sum-certain default charge is contingent (not required for the loan or forbearance) and is not related to time or the unpaid balance, it is a contract penalty rather than "interest in the nature of damages." *See United States v. Childs*, 266 U.S. 304, 307 (1924) ("[a] penalty is a means of punishment; interest a means of compensation"). The

decision below conflicts with these common law principles and improperly allows one state's legislative decisions to preempt the contract laws of other states.

D. The Lower Court Ignored the Fact that § 521 Preempts Only Statutory and Constitutional Usury Ceilings.

Even though cardholder's claims arise under state consumer protection and contract laws rather than Colorado's usury statutes, the court below concluded that § 521 preempts those claims. Section 521, however, expressly preempts only "State constitution[s] or statute[s]." In *Cipollone*, 505 U.S. 504, this Court made it clear that such limited preemption language does not eradicate the common law. In fact, § 521's preemption extends no further than state statutory and constitutional usury ceilings.

In *Cipollone*, the Court reviewed two preemption provisions contained in federal legislation governing the advertising and labeling of cigarettes. One of the provisions mandated that no statement relating to smoking and health, other than the federally approved standard, "shall be required" in the packaging or advertising of cigarettes. The Court construed the language as preempting only "*positive enactments by legislatures* or administrative agencies that mandate particular warning labels." *Id.* at 519 (emphasis added). Because the provision referred *only* to statutory enactments, it did not eradicate common law remedies. *Id.* Similarly, § 521's preemption of such positive legislative enactments as "constitution[s] and

statute[s]" does not reach Colorado's common law pertaining to unlawful contract penalties and liquidated damages.

The legislative history of DIDA likewise establishes that § 521 does not preempt the common law or even state statutes governing matters other than usury. In Title V of DIDA, Congress enacted § 521 along with other provisions which must be construed together in harmony with each other. *See, e.g., Massachusetts Mutual Life Insur. Co. v. Russell*, 473 U.S. 134, 146 (1985). One such related provision was § 501(a)(1) which dealt with home mortgage loans. In explaining that section's purpose, the Senate Banking Committee clarified that the provision "would preempt any State *constitutional or statutory* provision setting a *limit on mortgage interest rates*." S. Rep. No. 368, 96th Cong., 1st Sess. 18 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 254 (emphasis added). Similarly, in §§ 511, 521, 522 and 523, Congress included clauses preempting "State constitution[s] or statute[s]."[10] Although

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[10] The same preamble and preemption language was first used in the 1974 Brock Act, Pub. L. No. 93-501, §§ 201-206, 88 Stat. 1557, 1558-60, the heading of which speaks for itself: "TITLE II – INTEREST RATE AMENDMENTS REGARDING *STATE USURY CEILINGS* ON BUSINESS LOANS," (emphasis added). The amendment was a temporary law directed at the unique *statutory or constitutional usury limits* in just three states (Arkansas, Montana and Tennessee), and Congress emphasized that it was not "overriding [all] state law in this area, *especially with respect to consumer and home mortgage loans*." S. Rep. No. 1120, 93rd Cong., 2d Sess. 18 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6249, 6261. (emphasis added). As with other common law states, the legislative usury provisions of Arkansas, Montana and Tennessee did not apply to sum-certain penalties (late fees) within a borrower's control that were

the text of those sections originally appeared in Senate Bill 1988, which died in committee, the four provisions ultimately were included in Title V of DIDA. In debating the provisions in the Senate, Senators Pryor and Bumpers, the authors of S. 1988, and Senator Proxmire, the floor manager of DIDA, emphasized that the sole purpose of the measures was to eliminate state usury ceilings so that state chartered institutions could benefit from the inflation-sensitive federal discount rate, just as their federal bank competitors could under § 85 of the NBA. 125 Cong. Rec. 30655 (Nov. 1, 1979). Congress thus confined the preemptive language in § 521 and the other Title V sections to constitutional and statutory usury limits because it undoubtedly concurred with Senator Bumpers' observation that it was "not . . . particularly healthy to be overriding state law." *Id.*

A House Conference Report issued just one week before DIDA's passage once again confirmed the narrow preemptive reach of Title V's provisions, including § 521. That report discussed § 521 and the rest of Title V under the heading "STATE USURY LAWS" and repeatedly characterized each provision as preempting "State usury ceilings." H. R. Conf. Rep. No. 842, 96th Cong. 69, 78-79 (1980), *reprinted in* 1980 U.S.C.C.A.N. 299, 308-09. Finally, during the Senate's discussion of the report on March 27, 1980, the day before DIDA was passed, Senator Proxmire

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regulated under the common law of contractual liquidated damages. *See, e.g., Hayes v. First Nat'l Bank*, 256 Ark. 328, 507 S.W. 2d 701, 703 (1974); *Wilson v. Dealy*, 222 Tenn. 196, 201, 434 S.W. 2d 835, 837 (1968). This 1974 legislation, which was DIDA's ancestor, thus demonstrates that Congress intended § 521 to preempt only state statutory and constitutional usury ceilings, not the common law regulating contract penalties.

declared: "Title V [removes competitive restrictions on state chartered lenders] by preempting various *usury* laws while giving each State the opportunity to re-establish its *usury* limits if it desires to do so. . . . " 126 Cong. Rec. 6900 (Mar. 27, 1980) (emphasis added).

Thus, it is clear from § 521's legislative history that Congress intended the statute to preempt *only* statutory and constitutional usury ceilings. Because cardholder's claims do not arise under Colorado's usury laws, the court below erred in holding that the claims are preempted by § 521.

E. The Lower Court Erroneously Deferred to the Federal Deposit Insurance Corporation's Contradictory Interpretations of "Interest" in § 521.

The court below erroneously concluded that late payment fees are "interest" under § 521 based in part on the interpretation given to the term by the Federal Deposit Insurance Corporation ("FDIC"). However, in § 521(b), Congress expressly established the judiciary, not the FDIC, as the adjudicator of private rights of action arising under the statute. This Court has held that "a precondition to deference . . . is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Here, as in *Adams Fruit*, Congress has not delegated to the bank's regulator any authority to expand, contract or define the scope of § 521. Because the statute provides both a uniform remedy and a private right of action, only the courts have that interpretive authority. *See id.*

Moreover, even if the FDIC was entitled to some deference because of its administration of § 521, far less

deference is appropriate here because the agency's interpretation has been inconsistent. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 466 n. 30 (1987). *Accord Sherman*, 143 N.J. at 1047, 668 A.2d at 58. When this case (and others pending around the country) began, the FDIC, like the Office of the Comptroller of the Currency, maintained that the federal statutory term "interest" must be defined according to the law of a bank's home state. More recently, both agencies have changed their view, and have conceded that federal law must define the federal term. Because this inconsistency goes to the heart of the statutory interpretation, the lower court erred in deferring to the FDIC's contradictory opinions.[11]

F. Review Is Necessary to Provide Guidance to States, Banks, Consumers and the Lower Courts.

Both the conflicting opinions and the sheer number of pending petitions for certiorari demonstrate the urgent need for guidance from this Court. Until the Court decides the questions raised here, the controversy will continue, draining the pockets of consumers and litigants and the resources of the courts. To attract major credit card operations, state legislators will continue their race to the bottom in consumer protection by defining "interest" to embrace countless fees, including court costs and even attorneys' fees. National banks and federally-

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[11] Besides, the FDIC's opinions lack a sustainable rationale because, among other things, they ignore the many cases holding that single-sum contingent penalties are not interest and are illegal. *See, e.g., Meilink*, 314 U.S. at 570; *Kothe*, 280 U.S. at 226; *United States v. Childs*, 266 U.S. at 309; *Piaggio*, 83 U.S. (16 Wall.) at 386.

insured state banks located in those states will continue to export the contract penalties in violation of other states' laws, and consumers will continue to suffer from the unlawful practice.

Just as these issues were deemed appropriate for review in *Smiley*, they are appropriate for review here. Because this case presents important and urgent questions of federal law, the Court should grant certiorari here as it did in *Smiley*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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March 15, 1996

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SUPREME COURT, STATE OF COLORADO
DECEMBER 18, 1995
NO. 94SC382

SAMUEL J. STOORMAN, on behalf of himself and all others similarly situated, Petitioner,

v.

GREENWOOD TRUST COMPANY, Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

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JUSTICE MULLARKEY delivered the Opinion of the Court. JUSTICE SCOTT does not participate.

We granted certiorari to review the court of appeals' decision in *Stoorman v. Greenwood Trust Co.*, 888 P.2d 289 (Colo. 1994). The court of appeals held that section 521 of the Depository Institutions Deregulation and Monetary Control Act (DIDA), 12 U.S.C. section 1831d(a) (1988), preempted section 5-3-203(5)(a) of the Colorado Uniform Consumer Credit Code (UCCC), section 5-3-203(5)(a), 2 C.R.S. (1992), thereby allowing a federally-insured, state-chartered bank located in Delaware to charge a ten dollar late payment fee in addition to a finance charge to the credit card accounts of its Colorado customers. We affirm the judgment of the court of appeals, but we base our decision on different grounds.

I.

The respondent, Greenwood Trust Company (Greenwood), issues the Discover credit card and is a federally-insured, state-chartered bank located in Delaware. The petitioner, Samuel J. Stoorman (Stoorman), is a Colorado resident who became a Discover credit card member. When Stoorman failed to make a minimum monthly payment on his Discover credit card account, Greenwood assessed a ten dollar late payment fee to Stoorman's credit card account.

Stoorman initiated this class action, on behalf of himself and all others similarly situated, alleging that Greenwood violated section 5-3-203(5)(a) of the UCCC by charging a late payment fee in addition to a finance charge to his Discover credit card account. The district court granted Greenwood's motion for summary judgment, holding that section 521 of the DIDA preempts the Colorado consumer protection law. The court of appeals affirmed the dismissal, and we granted certiorari. We conclude that, as a matter of federal law, the ten dollar late payment fee imposed on Stoorman's Discover credit card account is a form of "interest" under section 521 of the DIDA. Because Greenwood is a federally-insured, state-chartered bank located in Delaware, and Delaware law permits the imposition of a late payment fee, Greenwood can charge Stoorman a late payment fee despite the fact that a Colorado consumer protection law prohibited such fees.

II.

As a federally-insured, state-chartered bank, Greenwood is governed by the DIDA. 12 U.S.C. § 1831d(a). Congress enacted the DIDA in 1980 in response to economic conditions affecting the banking industry. *Hill v. Chemical Bank*, 799 F. Supp. 948, 951 (D. Minn. 1992). In 1979, the Federal Reserve rate rose sharply as a result of the unprecedented crisis of simultaneous recession and inflation. The increase in the Federal Reserve rate caused national banks to gain a competitive advantage over state banks in states with lower interest rate ceilings. The DIDA was enacted to create parity between national and

state banks. *Id.* Section 521 of the DIDA, 12 U.S.C. section 1831d(a), provides:

> In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates, such State bank[s] . . . may, notwithholding [sic] any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any note, bill of exchange, or other evidence of debt, interest at the rate . . . allowed by the laws of the State . . . where the bank is located.

12 U.S.C. § 1831d(a) (1988). Congress incorporated the language of section 85 of the National Bank Act (NBA), 12 U.S.C. section 85, which governs national banks, into section 521 of the DIDA. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 825 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993). Section 85 of the NBA provides:

> Any, association [national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State . . . where the bank is located.

12 U.S.C. § 85 (1982).

Neither the NBA nor the DIDA defines the term "interest" or "interest at the rate." Generally, similar language should be interpreted in the same manner, unless the context requires different interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Moreover, Congress is

presumed to be aware of judicial interpretations of statutory language when it intentionally incorporates the language of one statute into another statute. *Id.*

In *Copeland v. MBNA Am. Bank, N.A.*, No. 94SC409 (Colo. Nov. 20, 1995), we examined the definition of the term "interest" in section 85 of the NBA. In *Copeland*, we held that, as a matter of federal law, late payment fees are included as a form of "interest" under section 85 of the NBA, 12 U.S.C. section 85 (1982). Thus, federal law authorized a national bank located in Delaware to charge Colorado customers a fifteen dollar late payment fee as allowed under Delaware law.

In this case, we must define the term "interest" in section 521 of the DIDA. We are persuaded for several reasons that late payment fees are a form of "interest" under section 521 of the DIDA. First, because section 521 of the DIDA incorporates its language from section 85 of the NBA, the statutory language should be given the same interpretation. Moreover, the Federal Deposit Insurance Corporation (FDIC), the government agency charged with administering the DIDA, has interpreted the term "interest" in section 521 of the DIDA as including late payment fees charged by federally-insured, state-chartered banks. *See* 12 C.F.R. § 7.7310(a). Finally, the majority of decisions examining the definition of the term interest in section 521 of the DIDA have held that late payment fees are included as a form of interest. *See Greenwood*, 971 F.2d at 818; *Ament v. PNC Nat. Bank*, 849 F. Supp. 1015 (W.D. Pa. 1994); *Hill*, 799 F. Supp. at 948. *Compare with Hunter v. Greenwood Trust Co.*, No. A-103-94 (N.J. Nov. 28, 1995); *Gadon v. The Chase Manhattan Bank*, 653 A.2d 697 (Pa. Super. 1995).

Therefore, we conclude, that, as a matter of federal law, late payment fees are included as a form of "interest" under section 521 of the DIDA. Because Greenwood is a federally-insured, state-chartered bank located in Delaware, and Delaware law permits the imposition of a late payment fee, Greenwood can charge Stoorman a ten dollar late payment fee despite the fact that a Colorado consumer protection law prohibited such fees.

Accordingly, we affirm the judgment of the court of appeals.

JUSTICE SCOTT does not participate.

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC382
CERTIORARI TO THE COLORADO COURT OF APPEALS, 93CA0224
DISTRICT COURT, CITY AND COUNTY OF DENVER, 92CV1789

ORDER OF COURT

SAMUEL J. STOORMAN, on behalf of himself and all others similarly situated,

Petitioner,

v.

GREENWOOD TRUST COMPANY,

Respondent.

Upon consideration of the Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, GRANTED as to the issues set forth below, and the briefs shall be filed as follows:

(a) Petitioner's Opening Brief shall be filed within forty days from this date;

(b) Respondent's Answer Brief shall be filed within thirty days from receipt of the Opening Brief;

(c) Petitioner's Reply Brief may be filed within fourteen days from receipt of the Answer Brief.

Pursuant to C.A.R. 54(a), the record on file will be treated as though sent up in response to a formal writ.

The summary of the issues as announced by the Court this day is as follows:

Whether the terms "interest" and "rate" in 12 U.S.C. § 1831d(a) (1988) include contingent penalty charges (late fees), which were not considered "interest" at common law, so as to preempt, under the Supremacy Clause of the United States Constitution, Colorado's prohibition and regulation of late charges on revolving credit accounts.

Whether Congress intended Delaware's legislative definition of "interest" to preempt Colorado's consumer protection and common laws limiting contractual late charges on revolving credit accounts.

Whether 12 U.S.C. § 1831d(a) (1988) is unconstitutional under Article IV of the United States Constitution because it delegates Congress' power to preempt state law to the home states of federally insured banks.

BY THE COURT, EN BANC, JANUARY 30, 1995.
JUSTICE SCOTT does not participate.

cc:

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Patrick H. Stanford, Clerk
Colorado Court of Appeals

COLORADO COURT OF APPEALS April 7, 1994
No. 93CA0224

Samuel J. Stoorman, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

Greenwood Trust Company,

Defendant-Appellee.

Appeal from the District Court of the City and County of Denver
Honorable J. Stephen Phillips, Judge
No. 92CV1789

Division IV JUDGMENT AFFIRMED
Opinion by JUDGE MARQUEZ
Plank and Rothenberg, JJ., concur

Bader & Villanueva, P.C., Gerald L. Bader, Jr., Jeffrey M. Villanueva, Renee B. Taylor, Denver, Colorado; Chimicles, Burt, Jacobsen & McNew, Nicholas E. Chimicles, Michael D. Donovan, Haverford, Pennsylvania, for Plaintiff-Appellant

Holme Roberts & Owen, Jeffery A. Chase, Lawrence M. Zavadil, Denver, Colorado; Wolf, Block, Schorr & Solis-Cohen, Burt M. Rublin, Alan S. Kaplinsky, Jeffrey S. Saltz, Philadelphia, Pennsylvania, for Defendant-Appellee

Plaintiff, Samuel J. Stoorman, on behalf of himself and all others similarly situated, appeals the summary judgment entered in favor of defendant, Greenwood

Trust Company. The trial court determined that plaintiff's claims seeking a refund of all delinquency or late payment fees charged were preempted by §521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), 12 U.S.C. §1831d (1988). We affirm.

Plaintiff alleges that he is a resident of Colorado and the holder of a "Discover" credit card. Defendant is a bank located in Delaware and whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC). Defendant offers the Discover Card to Colorado residents.

The terms and conditions applicable to use of the Discover Card are spelled out in a cardmember agreement, which stipulates that the holder must make a minimum monthly payment. Failure to make this payment in a timely fashion constitutes a default. If the default is not cured within twenty days, a ten-dollar late charge is automatically assessed. Defendant separately identifies the late charge from other charges in its monthly billing statement.

In an amended class action complaint, plaintiff alleges that the late charges, which defendant imposed pursuant to its credit card contract with plaintiff, violate the Colorado Consumer Credit Code, §§5-3-203 and 5-5-202, C.R.S. (1992 Repl. Vol. 2), and other statutes. Plaintiff also alleges that defendant converted the late charges from plaintiff on a false and illegal claim of right and that the late charges constitute an illegal penalty, and thus, a breach of contract.

I.

On appeal, the issue is whether the trial court correctly determined that §521 of DIDA preempts Colorado law. Specifically, the issue is whether defendant, a federally-insured, state-chartered bank located in Delaware, may assess its Discover credit card holders located in Colorado a late charge on delinquent accounts, a charge permitted in Delaware, but ostensibly prohibited in Colorado. We conclude that Colorado law is preempted.

The preemption doctrine is derived from the supremacy clause U.S. Const. art. VI, cl. 2. There are several ways Congress can preempt state law. Congress can expressly declare that states are precluded from legislating in an area of law. When Congress does not expressly preclude state legislation, state legislation may be preempted as a result of implied preemption or conflict preemption. *Rosa v. Warner Electrical Contracting*, ___ P.2d ___ (Colo. No. 92SC689, January 31, 1994).

In any preemption analysis, the question whether federal law preempts a state statute is one of congressional intent. *Banner Advertising, Inc. v. People*, ___ P.2d ___ (Colo. No. 92SC796, February 14, 1994).

In order to understand the preemption theory in this case, it is necessary to start with the National Bank Act of 1864, ch. 106, 13 Stat. 99 (1864) (Bank Act).

Under the Bank Act, a national bank may charge interest on any loan at the rate allowed by the laws of the state in which the bank is located. 12 U.S.C. §85 (1988). In

addition, a national bank may "export" a favorable interest rate from the state in which it is located in transactions with borrowers from other states. *Marquette National Bank v. First Omaha Service Corp.*, 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978); *Hill v. Chemical Bank*, 799 F. Supp. 948 (D. Minn. 1992).

As discussed in *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 776 F. Supp. 21 (D. Mass. 1991), *rev'd*, 971 F.2d 818 (1st Cir. 1992), the Bank Act favored the national banks and protected them from discriminatory state laws. For a time, the interest rates of state and national banks were comparable. However, in 1979, when the Federal Reserve rate rose sharply, national banks gained a competitive advantage in states with lower usury law interest ceilings. Congress responded to the unprecedented crisis of simultaneous recession and inflation by enacting DIDA. "As the language and legislative history of §521 make clear, Congress enacted §521 to create parity between national and state banks with respect to usury limitations." *Hill v. Chemical Bank, supra*, 799 F. Supp. at 951.

Section 521 of DIDA allowed state banks, like the national banks, to charge interest at the federal rate and thereby preempted state usury laws. 12 U.S.C. §1831d(a) (1988 & Supp. 1990). The express preemption clause contained in §521 provides in pertinent part:

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks . . . with respect to interest rates . . . such State bank[s] . . . may, notwithstanding any State constitution or statute which is hereby preempted

> for the purposes of this section, take, receive, reserve, and charge on any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

12 U.S.C. §1831d(a).

At the same time, Congress also recognized the continued importance of state consumer protection laws. Section 525 of DIDA gave states the option to enact legislation to override the federal preemption provisions. 12 U.S.C. §1730g (1988) (note).

A.

Plaintiff first Contends that because Congress intended the word "interest" in §521 to be interpreted under the federal common law and that because "interest," as defined by federal case law, does not include late charges, Colorado law is not preempted with respect to late charges. We disagree.

To address this issue, we rely on the First Circuit's well reasoned decision in *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *rev'g* 776 F. Supp. 21 (D. Mass. 1991). There, the First Circuit stated:

> In the first place, we do not believe that the plain meaning of "interest" necessarily restricts

> the definition of the word to numerical percentage rates. Reference works typically define interest as "a charge for borrowed money[,] *generally* a percentage of the amount borrowed." *Websters Ninth New Collegiate Dictionary* 630 (1989) (emphasis supplied); *see also Black's Law Dictionary* 812 (6th ed. 1990). Such definitions do not limit interest to numerical percentage rates, for they simply note that interest is often, but not always, expressed as a percentage. . . .
>
> Judicial opinions also tend to shy away from limiting the word "interest" to numerical percentage rates. Specifically, federal case law has long suggested that, in ordinary usage, interest may encompass late fees and kindred charges. *See, e.g., Shoemaker v. United States*, 147 U.S. 282, 321, 13 S.Ct. 361, 394, 37 L.Ed. 170 (1893) ("Interest accrues either by agreement of the debtor to allow it for the use of money, or, in the nature of damages, by reason of the failure of the debtor to pay the principal when due."); *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 185, 21 L.Ed. 128 (1873) ("[i]nterest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention").
>
> . . . Default necessarily increases the creditor's cost of processing a loan. Therefore, a late fee is sufficiently related to the "use or forbearance of money, or . . . damages for its detention" that it can appropriately be classified as "interest."

Greenwood Trust Co. v. Commonwealth of Massachusetts, supra, 971 F.2d at 824-25.

Perhaps most persuasive is the rationale of the First Circuit that Congress incorporated into §521 of DIDA

language used in §85 of the Bank Act. Section 85 of the Bank Act provides in pertinent part:

> [A national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater. . . .

12 U.S.C. §85 (1988). "The historical record clearly requires a Court to read the parallel provisions of DIDA [§521] and the Bank Act [§85] *in pari materia*." *Greenwood Trust Co. v. Commonwealth of Massachusetts, supra*, 971 F.2d at 827; *accord Hill v. Chemical Bank, supra*. The First Circuit then noted that under §85 of the Bank Act:

> Several courts . . . have had little trouble in construing the term "interest" to encompass a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate. *See, e.g., American Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 787-88 (9th Cir. 1982) (compensating balance requirement); *Fisher v. First Nat'l Bank*, 548 F.2d 255, 258-61 (8th Cir. 1977) (fee for cash advance); *Panos v. Smith*, 116 F.2d 445, 446-47 (6th Cir. 1940) (taxes and recording fees); *Cronkleton v. Hall*, 66 F.2d 384, 387 (8th Cir.) (bonus or commission paid to lender), *cert. denied*, 290 U.S. 685, 54 S.Ct. 121, 78 L.Ed 590 (1933); *Nelson v. Citibank (South Dakota) N.A.*, 794 F. Supp. 312, 318 (D. Minn. 1992) (late fees).

Greenwood Trust v. Commonwealth of Massachusetts, supra, 971 F.2d at 829; *see also, Hill v. Chemical Bank, supra.* Thus, we conclude, as the First Circuit did in *Greenwood Trust,* that "interest" under §521 includes late fees. We further conclude that plaintiff's other contentions as to the meaning of "interest" in §521 are without merit.

B.

Plaintiff next alleges that even if §521 preempts Colorado statutory law, it does not preempt the common law. We disagree.

The pertinent part of §521 reads:

> [S]uch State bank[s] . . . may, notwithstanding any *State constitution or statute* which is hereby preempted for the purposes of this section, take, receive, reserve, and charge . . .

12 U.S.C. §1831d(a) (1988). (emphasis added).

This section does not explicitly state that it preempts the "common law." *Cf.* 12 U.S.C. §2205 (preempting "any State Constitution or statute or other laws"). Conversely, it does not contain a savings clause for state common law claims. *See Gilbert v. Greenwood Trust Co.,* [Current] Fed. Banking L. Rep. (CCH) ¶ 89,412 (Court of Common Pleas, Phila. County, Pa. March 11, 1993) (*citing* 15 U.S.C. §4406(c) ("Nothing in this Act shall relieve any person from liability at common law. . . . "), 49 U.S.C. App. §1506 ("Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law. . . . "), and two other statutes).

In *Gilbert* the court stated:

> Plaintiffs have not brought to this Court's attention any Congressional legislative history that persuades this Court that Congress intended to preserve state common law claims which would affect the charges that banks could impose for loans. Finally, plaintiffs have not advanced to this court any cogent theory to explain why Congress intended to preempt state constitutions – the supreme law of the states – and state statutes – the most current and frequently employed state vehicle for regulating charges by lenders – and at the same time might have intended to preserve state common law claims.

Gilbert v. Greenwood Trust Co., supra, at 82,831.

Also, in *Hill v. Chemical Bank, supra,* the court determined that §521(b) creates an exclusive federal remedy. An exclusive federal remedy is inconsistent with the idea that a plaintiff can seek relief under state common law theories. *First National Bank v. Nowlin,* 509 F.2d 872 (8th Cir. 1975).

Thus, we conclude that because a contrary conclusion would conflict with the underlying purpose of §521, plaintiff's common law challenges are also preempted. *See* Letter of Advice from Douglas H. Jones, Dep. Gen. Coun., FDIC (July 12, 1993).

C.

Last, plaintiff argues that because Colorado opted out of DIDA, Colorado law is not preempted. We disagree.

In §525 of DIDA, 12 U.S.C. §1730g (1988) (note), Congress provided that any state could opt out of §521's preemptive grasp. In 1981, Colorado enacted §5-13-104, C.R.S. (1992 Repl. Vol. 2), which provides:

> Other loans. In accordance with section 525 of Public Law 96-221, it is declared that the state of Colorado does not want the amendments to the "Federal Deposit Insurance Act", the "National Housing Act", and the "Federal Credit Union Act" made by sections 521 to 523 of Public Law 96-221 prescribing interest rates and preempting state interest rates to apply in this state. The rates established in article 1 to 9 of this title shall control consumer credit transactions in the state of Colorado.

Effective August 9, 1989, Congress repealed the opt-out provision of DIDA. *See* Financial Institutions Reform, Recovery and Enforcement Act of 1989, §407 Pub. L. No. 101-73, 103 Stat. 183, 363 (1989). Here, plaintiff did not incur any late charges on his Discover Card until after that date.

However, even if Colorado's opt-out remains effective, we conclude that §525 prevents an opt-out in this case.

Section 525 provided that a state could opt out of §§521 to 523 only "with respect to loans made in such state." 12 U.S.C. 1730g (1988) (note).

In construing this language, the FDIC stated in an advisory opinion that:

> [The State's right under section 525 to] countermand [federal preemption] belongs to the State where the loan is made. . . . The fact

> that a State has countermanded under section 525 should not affect the usury preemption of section 521 for a bank not located in that State, so long as the loan is not made in the State that has countermanded.

Dep. Gen. Coun. Mem., FDIC-88-45 (June 29, 1988), Fed. Banking L.Rep. (CCH) §81.110; *but see Greenwood Trust Co. v. Commonwealth of Massachusetts, supra,* 776 F. Supp. 21, *rev'd on other grounds,* 971 F.2d 818 (on appeal, the First Circuit did not have to resolve this issue, because it concluded that Massachusetts opted back into DIDA before the litigation began).

We agree with the FDIC's opinion and conclude that Colorado could opt out only with respect to loans made in Colorado.

Colorado's version of the Uniform Consumer Credit Code provides: "A loan or modification of a loan agreement is made in this state if a writing signed by the debtor and evidencing the debt is received by the lender in this state." Section 5-1-201(1)(c), C.R.S. (1992 Repl. Vol. 2); *see also* Flynn, *Colorado Usury: The Sequel – Part I,* 23 Colo. Law. 565, 566 (March 1994); *cf.* §5-1-201(2), C.R.S. (1992 Repl. Vol. 2) (regarding revolving charge accounts).

Because in the present case the lender is located in Delaware, we conclude that even if unaffected by the repeal of the opt-out provision, the opt-out is ineffective with respect to the loans made in this case.

The judgment is affirmed.

JUDGE PLANK and JUDGE ROTHENBERG concur.

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
Civil Action No. 92 CV 1789

ORDER

SAMUEL J. STOORMAN,

Plaintiff,

vs.

GREENWOOD TRUST COMPANY,

Defendant.

The Defendant, Greenwood Trust Company, administers the Discover Credit Card. The named plaintiff is one of thousands who have been charged "late charges" which are claimed to be in violation of Colorado's Uniform Consumer Credit Code. The plaintiff is seeking class certification. The case is in its embryonic stages.

The defendant has moved to dismiss, arguing that state legislation as to those "late charges" are inoperable as preempted by federal statute, 12 U.S.C. § 1831(D) (the Depository Institutions Deregulation an [sic] Monetary Control Act of 1980, commonly known as D.I.D.A.) Two or three federal district judges have agreed with this position, as has the First Circuit in *Greenwood Trust v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992). There is no Colorado or Tenth Circuit decision on point of which this court is aware.

There is no provision in the law for a predetermination by an appellate court of a "lynchpin" legal question such as this. The Colorado Court of Appeals is limited to

a review of final judgments (granting the motion to dismiss would here constitute a final judgment). See C.R.S. 13-4-102. The Supreme Court is limited to reviewing issues on appeal or under compelling circumstances justifying an original proceeding. See C.A.R. 21(a). Yet this case is postured as a class action case – one involving considerable expense and time to the parties and to the trial courts.

Thus, in view of the economics involved and in view of the First Circuit opinion which seems to be the currently best authority in the issue, the defendant's Motion to Dismiss is granted.

SO ORDERED.

DATED this 4th day of February, 1993.

BY THE COURT:

/s/ J. Stephen Phillips
J. Stephen Phillips
District Court Judge

Copies of Order mailed to:

All counsel

MAR 6 11 59 PM '92

DISTRICT COURT DENVER COUNTY,
STATE 0F COLORADO

Case No. '92 CV 1789, Courtroom

CLASS ACTION COMPLAINT

SAMUEL J. STOORMAN, on behalf of himself and all others similarly situated,

Plaintiff,

v.

GREENWOOD TRUST COMPANY,

Defendant.

Plaintiff, by his counsel, alleges upon knowledge with respect to himself and his own acts, and upon information and belief as to all other matters, based, in part, on the investigation of counsel and publicly available reports and statements as follows:

NATURE OF THE CASE

1. This is a consumer class action, pursuant to the Colorado Consumer Credit Code and the common law, brought on behalf of all residents of Colorado who are or have been holders of a Discover credit card issued by Defendant Greenwood Trust Company ("Greenwood"), and who have been or might be in the future charged delinquency or late payment charges for monthly installment payments which were not paid when due. Plaintiff,

on behalf of himself and the class, seeks refund of all delinquency or late payment fees charged or collected by the Defendant, all interest charged on such late payment fees, a penalty in an amount to be determined by the Court which will not exceed the greater of the credit service charge, or ten (10) times the amount of the excess charge pursuant to C.R.S. §5-5-202(4), given that Greenwood has made late charges in deliberate violation of, or in reckless disregard of, the laws of the State of Colorado, and for an injunction prohibiting Defendant from continuing to contract for and collect late charges from residents of Colorado in violation of applicable Colorado law.

JURISDICTION

2. Jurisdiction is proper in this Court because the claims arise under Colorado statutory and common law, concern Colorado citizens, and because Defendant transacts business within this State.

PARTIES

3. Plaintiff, Samuel J. Stoorman, is a resident of Denver County. He first obtained a Discover Card in 1989 in response to a direct mail solicitation sent to him in Denver from the Defendant. He has been required to pay late fees by the Defendant.

4. Defendant Greenwood is a state banking association chartered under the laws of the State of Delaware and having its principal office in New Castle, Delaware. Greenwood actively solicits Colorado consumers through direct mailings, "take one" advertisements, and multi-

media advertising to apply for, accept and use credit cards issued by Greenwood within Colorado.

CLASS ACTION ALLEGATIONS

5. Plaintiff brings this case as a class action pursuant to Rule 23 of the Colorado Rules of Civil Procedure on behalf of a class (the "Class") consisting of all the residents of Colorado who are or have been holders of a Discover credit card issued by Defendant Greenwood, and have been charged or may be charged illegally a delinquency fee or late charge.

6. On information and belief, there are thousands of persons who are or have been holders of the Discover credit card issued while they were residents of Colorado. A substantial number of such persons have been charged a late charge by Defendant. Although the exact number of such persons is unknown to plaintiff at this time, Defendant's record systems contain information on the identities and location of all such cardholders as well as the amounts of the illegal charges imposed upon or collected from all such persons. Given the nature and extent of Defendant's solicitation and activity in Colorado, it is clear that the members of the Class are so numerous that joinder of all members is impractical.

7. Plaintiff's claims are typical of the claims of the members of the Class since Plaintiff and the other members of the Class sustained damages arising out of the Defendant's wrongful conduct and violation of Colorado law.

8. Plaintiff will fairly and adequately protect the interest of the members of the Class and has retained counsel competent and experienced in class and consumer litigation.

9. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impractical. Furthermore, since the damages suffered by individual class members may be relatively small, the expense and burden of individual litigation makes it impractical for the class members to individually seek redress for the wrongs done to them. Plaintiff envisions no difficulty in the management of this action as a Class action.

10. Common questions of law and fact exist as to all members of the Class, and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact of the Class are:

a. Whether Colorado banking, consumer protection, usury, and common laws have been and continue to be violated by Defendant's acts as alleged herein;

b. Whether Defendant participated in the plan, scheme and course of conduct complained of herein; and

c. Whether the members of the Class sustained damages and, if so, what is the proper measure thereof.

FACTUAL BACKGROUND

11. Sometime in 1989, Plaintiff Stoorman was solicited by direct mail in Denver, Colorado to become a

Discover cardholder. Thereafter he applied for and received a Discover credit card mailed to him at his Colorado residence by Defendant. Plaintiff did not receive his card member agreement until he received the actual credit card. Neither the application nor the card member agreement disclosed that Colorado law prohibits and limits the charging of late fees for past installments or that the law of Plaintiff's resident state, Colorado, was different from the law of Delaware, the state in which Defendant is chartered. After receiving the credit card, Plaintiff used the credit card to purchase goods and services in Colorado, primarily for personal, family and household purposes and thereby accepted the credit card in Colorado within the meaning of C.R.S. §5-1-201.

12. Plaintiff Stoorman did not always pay the monthly minimum installment due on his account as stated on his monthly billing statements. As a result, his succeeding monthly billing statements, which were mailed to him in Colorado by Defendant, reflected imposition of "late charges" of $10 each. These late fee charges were added to the unpaid balance reflected on Plaintiff's monthly billing statements, and interest was charged on the resulting balance.

13. Plaintiff has since made payments to Defendant to reduce his unpaid balance, which includes paying both the late fee charges and interest calculated thereon.

14. Defendant issues the Discover card, pursuant to Card Member Agreements in the form attached to this Complaint as Exhibit A, to customers nation-wide, including thousands of residents of Colorado. For at least the past three years, Defendant has issued such cards at

an annual percentage rate finance charge of 19.8%. Pursuant to the card member agreement, Defendant also imposes a separate $10 late payment charge if the minimum payment due is not paid within 25 days after the payment due date in any one month. According to the Card Member Agreement, failure to make at least the minimum payment due by the due date in any month puts the customer in default and triggers the late payment charge.

15. Defendant actively solicits card member applications throughout Colorado and nationwide through direct mail, telemarketing, and "take-one" applications. Defendant also conducts extensive multi-media advertising nationwide, which includes advertising in Colorado, newspapers, television, radio, billboards and advertising panels.

16. Defendant does not include late charges in the computation or disclosure of annual percentage rate in the card member agreement, monthly billing statements, application forms, or national advertising. However, Defendant does separately identify the late payment charges in the card member agreement, and does separately identify finance charges and late payments on the monthly billing statement as "finance charges" and "late charges".

17. A Discover finance charge is imposed on unpaid balances which include unpaid late charges. Multiple late fees are assessed in successive billing cycles for continuing unpaid balances past the 25 day period. A monthly finance charge (which is equal to the annual percentage

rate divided by 12) is then imposed on the unpaid balances, including multiple late charges.

18. The late charges collected by Defendant are not components of the finance charges, and are not described as such in the card member agreement or in the monthly billing statements. The payment of a late charge does not, in itself, influence Defendant's decision as to whether to extend further credit or suspend the credit privileges. The purposes of Defendant's late charges are to deter default and to provide a source of revenue in addition to interest charges. The late charges are not stated in terms of percentages, and are not advertised by Defendant for the purposes of enabling consumers to compare such charges with those of Defendant's competitors.

19. Defendant sends thousands of Discover cardholders their monthly statements to Colorado addresses. It is on these monthly statements that Colorado cardholders, including Plaintiff, have received notice of the assessment of late fee charges. Card member payments to Defendant are then made by a check drawn on the card member's banking account, typically in Colorado. Plaintiff's payments, as with typical payments of other Discover cardholders in Colorado, were drawn on a Colorado bank account.

20. Discover cardholders may use their cards to make a purchase or to obtain cash at the location of participating merchants or at automatic teller machines (ATM) in Colorado.

21. Defendant not only actively solicits Colorado consumers within Colorado to become Discover cardholders, but it also solicits directly and indirectly, Colorado merchants and cash clearing systems, such as CIRRUS, to accept and honor the Discover credit cards.

22. On information and belief, out-of-state banks other than Defendant that solicit customers and issue credit cards in Colorado disclose on their application forms that late fee charges will not be charged to residents of Colorado and several other states. On information and belief, the fact that late fees may not be charged to Colorado residents by either out-of-state or in-state banks has not resulted in different interest rates being advertised or provided to Colorado consumers by any credit card issuers. Out-of-state banks issuing credit cards to Colorado residents have not been dissuaded or burdened from soliciting such business by the fact that Colorado law prohibits them from charging late fees.

23. To the extent Defendant must institute collection efforts against a past-due account of a cardholder residing in Colorado, Defendant has typically instituted suit and legal proceedings in the courts of Colorado. Defendant has also used and benefited from the judgment execution laws of the State of Colorado.

LEGAL BACKGROUND

24. Colorado law prohibits lender credit card issuers from charging customers any "delinquency fees" in addition to advertised interest rate service charges. C.R.S. §5-3-203(5)(a) (amended bylaws, 1991, H.D. 91-1212 §1, effective July 1, 1991). With respect to credit

cards issued by out-of-state banks and finance agencies, Colorado law makes it clear that it controls and applies to any contract accepted by a Colorado resident while he or she is located in Colorado. C.R.S. §5-1-201. The Colorado Legislature thus has expressed this State's strong and overriding interest in regulating all credit extension practices that reach inside the borders of the state.

25. Although Discover cardholders signed an agreement specifying the law of Delaware shall apply to the agreement, C.R.S. §5-1-201(9)(a) provides that such an agreement by a debtor is invalid, and that with respect to consumer loan lender credit cards such as the credit cards issued by Defendant Greenwood, such credit cards are considered consumer loans under C.R.S. §5-3-104. A Colorado resident may not contract that the law of another state shall apply to his credit card. Therefore, Colorado law, not Delaware law, applies with respect to the credit card agreements.

26. C.R.S. §5-1-201(12)(b) provides that "a lender, whether licensed or not, may not contract for or receive charges exceeding those permitted by this Code for supervised lenders." Greenwood is a supervised lender, C.R.S. §5-3-501(2), as it makes supervised loans defined by C.R.S. §5-3-501(1), i.e., consumer loans in which the loan finance charge exceeds twelve (12) percent per year.

27. With respect to a supervised loan, lenders may contract for and receive a loan finance charge not exceeding that permitted by C.R.S. §5-3-508(3)(a). Under the Colorado Consumer Credit Code, such banks, finance agencies and retailers may charge an interest rate on

outstanding credit card balances not to exceed twenty-one percent (21%) per year.

28. A separate section of the Colorado Consumer Credit Code §5-3-203, prohibits such banks and finance agencies from charging any late fees or delinquent fees on credit cards accounts:

> (5)(a) Except as provided in paragraph (b) of this subsection (5), with respect to a consumer loan, refinancing, or consolidation which is not precomputed, including a revolving loan account, the parties may contract for a delinquency charge on any installment not paid in full within ten days after its scheduled due date in an amount not exceeding the lesser of five percent of the unpaid amount of the installment or ten dollars; except that the provisions of this paragraph (a) shall not apply to a revolving loan account for which a lender credit card is issued by the lender to the debtor.

(Emphasis supplied). Thus banks, finance agencies, and retailers soliciting Colorado residents or operating within Colorado may charge a maximum annual percentage interest rate on the unpaid balances of 21%, but may not change any late fee or delinquency fee when the cardholder is late or even misses a monthly payment. Of course, interest continues to accrue on such unpaid balances.

29. Although Colorado law clearly limits the interest rate that Colorado banks and finance agencies may charge their customers, it does not limit the interest rate out-of-state banks may charge even where the consumers are residents of Colorado. This is because federal law

specifically addresses "interest rates" charged by national or state chartered banks. Under the National Bank Act, 12 U.S.C. §85, out-of-state banks are permitted to charge their customers any interest rate that is permitted by the law of the state in which the bank is located. Taking advantage of this law to attract the business of credit card issues in the early 1980's, several states – most notably Delaware and South Dakota – have virtually eliminated interest rate and other usuary [sic] restrictions, encouraging banks (such as Greenwood) to locate there.

30. Although federal law permits out-of-state banks such as Defendant to export to Colorado and other states interest rates permitted in their state of location, it does not permit them to export late fees or any other charges, fees or terms to a borrower state. Yet, as evidenced by this case, state and national banks located in deregulated states, including Defendant herein, have knowingly and repeatedly misused and misconstrued federal authority as a pretext and vehicle to evade state laws permitting non-interest rate charges such as late fees or other substantive requirements which are specifically addressed by Colorado law.

31. In contrast with states like Delaware and South Dakota, Colorado has sought to preserve its consumer protection and usuary [sic] laws. Colorado has not forsaken such protection simply to lure certain businesses to set up operations within the state. Defendant's conscious disregard of Colorado laws has undermined the carefully crafted regulatory scheme of Colorado, and has perverted the balance between the federal interest and [sic] permitting a national market for consumer interest rates and the state interest in protecting consumers against late fees,

hidden charges and overreaching credit collection practices.

32. By knowingly contracting for and charging Plaintiff and members of Class late fees or delinquency charges that are clearly prohibited by Colorado law, Defendant has willfully violated the law.

FIRST CLAIM FOR RELIEF
Pursuant to C.R.S. §5-5-202

33. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 32 as if fully set forth herein.

34. Defendant has willfully failed to comply with the provisions of the Colorado Consumer Credit Code (the "Code") as it has knowingly contracted for, charged and collected from Plaintiff, and the members of the Class, late fees and expenses prohibited under C.R.S. §5-3-203.

35. Pursuant to C.R.S. §5-5-202 Plaintiff and members of the Class are entitled to reimbursement of all late fees contracted for, charged and collected by Defendant. Furthermore, if the creditor, Greenwood, has made an excess charge in deliberate violation of or in reckless disregard of this Code, a penalty may be recovered even though the creditor has refunded the excess charge. The penalty a person may recover is the amount determined by a court which shall not exceed the greater of either the amount of the credit service charge, or ten times the amount of the excess charge. C.R.S. §5-5-202(4).

36. Accordingly, Defendant is liable to Plaintiff and the members of the Class for substantial actual damages, the precise amount which shall be determined after discovery of Defendant. Moreover, given the blatant and persistent nature of Defendant's misconduct, Plaintiff and other members of the Class should be awarded ten times the amount of the excess charge.

SECOND CLAIM FOR RELIEF
Pursuant to C.R.S. §5-3-203(5)(a)

37. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 36 as if fully set forth herein.

38. Pursuant to C.R.S. §5-3-203(5)(a), Defendant is prohibited from soliciting, contracting for, billing and continuing to collect from Colorado consumers, including Plaintiff and members of the Class, any late fees or delinquency charges on past installments. Upon information and belief, Defendant is continuing, and intends to continue to solicit, contract for, bill and collect late fees or delinquency charges.

39. Continuation by Defendant of its illegal practices will irreparably harm Plaintiff and members of the Class, as it will directly result in negative information being reported by Defendant to credit bureaus and credit reporting agencies. The reporting of such negative and legally incorrect information will constitute credit libel and will prevent Plaintiff and other members of the Class from obtaining credit from other sources or from obtaining credit on terms as favorable as those available to

persons whose credit reports lacks [sic] the negative information communicated by Defendant.

40. Plaintiff and other members of the Class are without an adequate remedy at law because it will be difficult, if not impossible, to prove the level of impact attributable to Defendant's transmission of negative credit information to credit reporting agencies on the decisions of other financial agencies to extend credit to Plaintiff and other members of the Class.

41. Accordingly, Defendant should be preliminarily and permanently enjoined and prohibited from continuing its illegal practices. Moreover, Defendant should be enjoined from communicating negative payment information about the accounts of Plaintiff and the members of the Class to any credit bureau or to any credit reporting agency to the extent that such information is, in whole or in part, related to the non-payment of an illegally charged late payment fee.

THIRD CLAIM FOR RELIEF
Unjust Enrichment

42. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 41 as if fully set forth herein.

43. By reason of the misconduct alleged above, Defendant has been unjustly enriched at the expense of Plaintiff and members of the Class.

44. The late fee charges imposed by Defendant were not and are not reasonably related to any administrative costs to Defendant that is [sic] not already inherent in the

establishment, investigation and maintenance of the credit extended to consumers and thus, are already accounted for in the interest rates charged under Defendant's 19.8% annual percentage rate finance charge.

45. Accordingly, Defendant is liable to the Plaintiff and the members of the Class in the amount of the unjust enrichment to Defendant from imposition and collection of such late fees, plus interest on such amount.

FOURTH CLAIM FOR RELIEF
Violations of the Colorado Consumer Protection Code

46. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 45 as if fully set forth herein.

47. By engaging in misconduct alleged above, Defendant has employed unfair methods of competition and unfair or deceptive acts or practices in the conduct of the trade or commerce of credit extension. In particular, Defendant's acts and practices constitute fraudulent conduct which creates, was designed to create, and will continue to create a likelihood of confusion or misunderstanding about the propriety of late charges imposed on members of the Class, including the liability or not of such members to pay late fees not permitted by Colorado law, but nonetheless charged the members credit card accounts.

48. As a direct and proximate result of Defendant's employment or use of these unfair methods of competition unfair or deceptive acts or practices, Plaintiff and the other members of the Class have sustained ascertainable

damages in as much as they have paid late fees to Defendant together with interest calculated on the late fees that were added to unpaid balances of the accounts of Plaintiff and other members of the Class.

49. Pursuant to C.R.S. §6-1-113, Plaintiff and other members of the Class are entitled to recover the excess amount they paid or if the creditor has made the excess charge in deliberate violation of Colorado law, three times the amount of actual damages sustained or two hundred fifty dollars, whichever is greater. The precise amount of such damages in the aggregate will be determined after discovery of Defendant.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the Class, prays for judgment as follows:

1. Declaring this action to be a proper Class Action pursuant to Rule 23 of the Colorado Rules of Civil Procedure, and that Plaintiff is a proper class representative of the Class;
2. Awarding Plaintiff and the other members of the Class compensatory damages as a result of the wrongs alleged in the First, Third and Fourth Claims for Relief;
3. Awarding Plaintiff and other members of the Class ten times the amount of the excess charged, as a result of the wrongs alleged in the First Claim for Relief;
4. Awarding Plaintiff and other members of the Class three times the amount of actual damages sustained or two hundred fifty dollars, whichever is greater, as a result of the

wrongs alleged in the Fourth Claim for Relief.

5. A preliminary and permanent injunction enjoining Defendant from continuing its illegal practices and from communicating adverse information related to late fees or delinquency charges to any creditor bureaus or credit reporting agencies requesting reports about Plaintiff or any member of the Class as prayed for in the Second Claim for Relief.

6. Awarding Plaintiff and the other members of the Class pre-judgment and post-judgment interest as a result of the wrongs complained of herein;

7. Awarding Plaintiff and other members of the Class the costs and expenses in this litigation, including reasonable attorneys' fees and expert fees and other costs and disbursements; and

8. Granting Plaintiff and the members of the Class such other and further relief as may be just and proper under the circumstances.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury of all issues so triable. Dated at Denver, Colorado this 6 day of March, 1992.

Respectfully submitted,

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[Exhibit Omitted In Printing]

(2)

Supreme Court, U.S.
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No. 95-1500

In The

Supreme Court of the United States

October Term, 1995

SAMUEL J. STOORMAN,

Petitioner,

v.

GREENWOOD TRUST COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Supreme Court

MEMORANDUM OF THE RESPONDENT

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QUESTION PRESENTED

The sole question properly presented for review is the third question listed in the petition, which respondent would suggest rephrasing as follows:

> Does the term "interest" in Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d, include late fees that a credit card borrower has agreed to pay in the event of delinquency?

Petitioner's first two questions are not presented by this case. The Colorado Supreme Court did not hold that the term "interest" in Section 27 is defined by reference to Delaware law. Instead, the Court repeatedly stated that this term is defined by federal law. (Pet. App. 4, 6, 7).

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Greenwood Trust Company states that it has no subsidiaries. Its corporate parent is NOVUS Credit Services, Inc., which in turn is owned by Dean Witter, Discover & Co.

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OPINIONS BELOW

The Opinion of the Colorado Supreme Court is published at 908 P.2d 133 (1995) and is reprinted in petitioner's Appendix at App. 1-7. The Opinion of the Colorado Court of Appeals is published at 888 P.2d 289 (1994) and is reprinted in petitioner's Appendix at App. 11-21. The order of the District Court, City and County of Denver, Colorado is unreported and is reprinted in petitioner's Appendix at App. 22-23.

JURISDICTION

The Colorado Supreme Court entered its judgment on December 18, 1995. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, is set out at page 3 of the Petition.

Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d, is set out at pages 3-4 of the Petition.

Section 950 of Title 5 of the Delaware Code is set out at pages 6-7 of the Petition.

ARGUMENT

Respondent Greenwood Trust Company ("Greenwood") hereby responds to, but does not oppose, the petition for a writ of certiorari to review the unanimous opinion rendered in this action on December 18, 1995 by the Colorado Supreme Court. In that opinion, the Colorado Supreme Court correctly held that late charges are "interest" for purposes of Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d, which was originally enacted as Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, § 521, 94 Stat. 132, 164-165 (1980).

Even though the Colorado Supreme Court's opinion was correct, Greenwood does not oppose the petition because it recognizes that this case satisfies the Court's criteria for granting certiorari. There presently exists an irreconcilable conflict between state supreme courts and United States Courts of Appeals concerning the meaning of "interest" in Section 27 of the Federal Deposit Insurance Act and the statute upon which it was modeled, Section 85 of the National Bank Act, 12 U.S.C. § 85. The First Circuit and highest courts of Colorado and California have held that the term "interest" in Section 521 of the Federal Deposit Insurance Act and Section 85 of the National Bank Act encompasses credit card late charges. *See Smiley v. Citibank (South Dakota), N.A.*, 11 Cal.4th 138, 44 Cal. Rptr.2d 441, 900 P.2d 690 (1995), *cert. granted*, 116 S. Ct. 806 (1996) (§ 85 case); *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal.App.4th 1563, 35 Cal. Rptr.2d 733 (1994), *review granted*, 38 Cal. Rptr.2d 346, 889 P.2d 540 (Cal. 1995), *review dismissed*, 46 Cal. Rptr.2d 748, 905 P.2d 417 (Cal. 1995), *petition for cert. pending*, No. 95-951 (filed

Dec. 18, 1995) (combined § 85 and § 521 case); *Richardson v. Citibank (South Dakota), N.A.*, 908 P.2d 532 (Colo. Dec. 18, 1995), *petition for cert. pending*, No. 95-1493 (filed March 18, 1996) (§ 85 case); *Copeland v. MBNA America, N.A.*, 907 P.2d 87 (Colo. 1995), *petition for cert. pending*, No. 95-1056 (filed Dec. 28, 1995) (§ 85 case); and *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (§ 521 case).

However, the Supreme Court of New Jersey has disagreed with these rulings, and instead has held that the meaning of "interest" in Section 27 of the Federal Deposit Insurance Act and Section 85 of the National Bank Act is narrowly restricted to percentage-based periodic rates. *Hunter v. Greenwood Trust Co.*, 143 N.J. 97, 668 A.2d 1067 (1995), *petition for cert. pending*, No. 95-963 (filed Dec. 18, 1995) (§ 521 case); *Sherman v. Citibank (South Dakota), N.A.*, 143 N.J. 35, 668 A.2d 1036 (1995), *petition for cert. pending*, No. 95-991 (filed Dec. 21, 1995) (§ 85 case).

This Court recently granted certiorari to resolve this conflict. *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal.4th 138, 44 Cal. Rptr.2d 441, 900 P.2d 690 (1995), *cert. granted*, No. 95-860, 116 S. Ct. 806 (1996). The only difference between this case and *Smiley* is that *Smiley* involves Section 85 of the National Bank Act, while this case involves Section 27 of the Federal Deposit Insurance Act. However, Section 27 was modeled upon Section 85, incorporates the same language, and has been repeatedly and uniformly construed *in pari materia* with Section 85. Indeed, petitioner does *not* challenge the Colorado Supreme Court's holding that the term "interest" in Section 27 of the Federal Deposit Insurance Act has the same meaning as "interest" in Section 85 of the National Bank

Act. (App. 6). Since the *Smiley* decision will be dispositive of this case as well,[1] respondent respectfully submits that the Court should hold this case in abeyance pending its decision in *Smiley*, and then decide this case in accordance with its decision in *Smiley*.

As noted above in the "Question Presented for Review," petitioner has misstated the issues that are presented by this case. Contrary to the assumption underlying petitioner's first two "Questions Presented," the Colorado Supreme Court did *not* hold that the term "interest" in Section 27 should be defined by reference to Delaware law. The Colorado Supreme Court made absolutely *no* reference to the Delaware statutory definition of "interest," and it repeatedly stressed that it was defining "interest" as a matter of *federal* law:

> We conclude that, *as a matter of federal law*, the ten dollar late payment fee imposed on Stoorman's Discover credit card account is a form of 'interest' under section 521 of DIDA. (App. 4) (emphasis added).
>
> * * *
>
> In *Copeland*, we held that, as a matter of *federal* law, late payment fees are included as a form of 'interest' under section 85 of the NBA, 12 U.S.C. section 85 (1982). Thus, *federal* law authorizes a national bank located in Delaware to charge

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[1] The "Questions Presented for Review" by petitioner in this case are virtually identical to those raised by the petitioner in *Smiley*. This is no doubt attributable to the fact that lead counsel for petitioner here also represents the petitioner in *Smiley*.

> Colorado customers a fifteen dollar late payment fee as allowed under Delaware law. (App. 6) (emphasis added).
>
> * * *
>
> Therefore, we conclude that, as a matter of *federal* law, late payment fees are included as a form of 'interest' under section 521 of the DIDA. (App. 7) (emphasis added).

CONCLUSION

Even though the Colorado Supreme Court's decision is correct, Greenwood recognizes that the Court's criteria for certiorari are satisfied here, and therefore it does not oppose the petition. Since the issue presented here is the same as that now pending in *Smiley v. Citibank*, Greenwood respectfully submits that the Court should hold this case until its decision in *Smiley*.

Respectfully submitted,

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